

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.D., a Person Coming Under the Juvenile  
Court Law.

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

SOPHIA S.,

Defendant and Appellant.

F072930

(Super. Ct. No. 13CEJ300131-3)

In re J.D., a Person Coming Under the Juvenile  
Court Law.

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

WILLIAM D.,

Defendant and Appellant.

F073108

(Super. Ct. No. 13CEJ300131-3)

**ORDER MODIFYING OPINION,  
DENYING PETITIONS FOR  
REHEARING, AND DENYING  
REQUEST FOR PUBLICATION  
[No Change in Judgment]**

**THE COURT:**

It is ordered that the opinion filed herein on October 26, 2016, be modified as follows:

1. On page 2, the second introductory paragraph beginning “William D. (father) also appeals” is modified to read as follows:

William D. (father) also appeals, arguing only that, if the judgment terminating mother's parental rights is reversed, the judgment terminating his parental rights must also be reversed. Because we have rejected mother's arguments, we necessarily reject his as well.

2. Under part II., the paragraphs on pages 22 and 23 beneath the side heading "Standard of Review" are deleted and the following paragraphs inserted in their place:

We acknowledge the parties' discussion in their respective briefing regarding the split of authority as to whether the substantial evidence standard, the abuse of discretion standard, or a hybrid standard applies in reviewing the juvenile court's rejection of exceptions to adoption. (See *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315 and *In re K.P.* (2012) 203 Cal.App.4th 614, 621–622 [hybrid combination of substantial evidence and abuse of discretion standards; applying substantial evidence test to determination of existence of a beneficial sibling relationship and the abuse of discretion test to issue of whether that relationship constitutes a compelling reason for determining termination would be detrimental to the child]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*) [substantial evidence test: "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order"]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [abuse of discretion test].) Mother asserts our review should be for substantial evidence; the department, the hybrid standard.

"Under any of these standards of review, our conclusion in this case would be the same because the practical differences between them are "not significant," as they all give deference to the juvenile court's judgment. (See *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) "[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling.... Broad deference must be shown to the trial judge. The reviewing court should interfere only "if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he [or she] did.' ...'" (*Ibid.*) Similarly, a substantial evidence challenge to the juvenile court's failure to find a beneficial parental relationship or a sibling relationship cannot succeed unless the undisputed facts establish the existence of those relationships, since such a challenge amounts to a contention the "undisputed facts lead to only one conclusion." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1529; see *In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1314.)

The introduction of citations to *In re Autumn H.*, *In re Jasmine D.*, and *In re I.W.* at this juncture will require the addition of *supra* to subsequent references.

There is no change in the judgment. The petitions for rehearing filed by appellants are denied.

The request of respondent for publication of the opinion is hereby denied. The opinion does not establish a new rule of law nor does it meet any of the other criteria set forth in California Rules of Court, rule 8.1105(c).

In compliance with California Rules of Court, rule 8.1120(b), the Clerk/Administrator of this court shall transmit copies of the request for publication, the opinion, and this order to the Supreme Court.

MCCABE, J.\*

WE CONCUR:

LEVY, Acting P.J.

PEÑA, J.

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\*Judge of the Superior Court of Merced County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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(Super. Ct. No. 13CEJ300131-3)

**OPINION**

F073108

(Super. Ct. No. 13CEJ300131-3)

APPEAL from orders of the Superior Court of Fresno County. Kimberly  
Nystrom-Geist, Judge.

Linda J. Conrad, under appointment by the Court of Appeal, for Defendant and Appellant Sophia S.

Carol A. Koenig, under appointment by the Court of Appeal, for Defendant and Appellant William D.

Daniel C. Cederborg, County Counsel, and Brent C. Woodward, Deputy County Counsel, for Plaintiff and Respondent.

-ooOoo-

Sophia S. (mother) appeals from the juvenile court's order denying her petition for modification under Welfare and Institutions Code section 388<sup>1</sup> and terminating her parental rights over her child, J.D., under section 366.26. She contends she was improperly denied an evidentiary hearing on her section 388 petition. She also argues the juvenile court erred when it found the beneficial parent-child relationship exception (§ 366.26, subd. (c)(1)(B)(i)) and the sibling relationship exception (§ 366.26, subd. (c)(1)(B)(v)) did not apply and terminated her parental rights. For the reasons articulated below, we reject mother's arguments and affirm.

William D. (father) also appeals, arguing only that, if the judgment terminating mother's parental rights is reversed, the judgment terminating his parental rights must also be reversed. Father has forfeited the issue by failing to raise it below. In any event, because we have rejected mother's arguments, we necessarily reject his as well.

## **FACTUAL AND PROCEDURAL HISTORY**

### **Detention**

Mother and father are the parents of J.D., born in August of 2011.<sup>2</sup> Mother has a child welfare history dating back to 1997, which includes 30 referrals for general neglect

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Mother has a total of six children, J.D. being the youngest and the only one at issue here.

and emotional abuse. Mother and father both have criminal histories: mother for battery of a non-cohabitant and child endangerment, and father for driving under the influence, stolen vehicle, possession of controlled substance, possession of an open container while driving, possession of drug paraphernalia, corporal injury to a spouse/cohabitant, possession for sale, sale of controlled substances, violation of a stay away order, violation of a domestic violence protective order, obstructing a police officer, possession of a dangerous weapon, possession of burglary tools, and possession of ammunition by a prohibited person. Mother is hearing impaired and communicates via sign language.

J.D. came to the attention of the Fresno County Department of Social Services (department) in May of 2013, when mother was seen pushing and slapping father at a hospital where she was being treated for a spider bite. She was cited for misdemeanor battery. Later that same evening, both were seen fighting in the middle of the street and mother tried to grab J.D. from father. Mother and father have a history of domestic violence calls, with approximately eight calls since 2009. A section 300 petition was filed on behalf of J.D. and two of his older half siblings, who were living in the same home at the time. The petition alleged fighting and ongoing domestic violence in the home.

J.D. was placed with paternal grandmother (grandmother). J.D.'s two half siblings, ages 15 and 17, were placed with mother and their father, Patrick H., who was living with mother as he had nowhere else to go. Both mother and father denied responsibility for the domestic violence, each blaming the other.

At the detention hearing May 8, 2013, the juvenile court ordered J.D. detained and placed with grandmother. Mother and father were ordered twice weekly supervised visits and services for parenting and substance abuse, mental health and domestic violence evaluations and recommended treatment.

### Jurisdiction

Mother submitted on the petition June 21, 2013; father submitted on the amended petition August 5, 2013.

### Disposition

Due to numerous continuances, the disposition hearing was not held until January 3, 2014. The juvenile court declared J.D. a dependent child and ordered that he remain placed in grandmother's home. Both parents were ordered to receive reunification services and unsupervised visits. A combined six-month/12-month status review hearing was set for June 16, 2014.

### Review Hearing

In the June 2014 report prepared in anticipation of the review hearing, the department recommended reunification services be terminated for both mother and father, that visits be supervised, and that a section 366.26 permanency hearing be set. The report set out mother and father's progress to date on their ordered services.

Mother had completed parenting classes and continued to receive in home educational services with J.D.; father had not yet completed parenting classes.

Mother started individual therapy, but, by May of 2014, had been discharged due to frequent no-shows and last minute cancellations. Mother was not interested in completing another mental health assessment, stating she felt she was not benefitting from therapy. Father was not receptive to the idea of therapy.

Both mother and father completed intensive outpatient drug and alcohol treatment programs. Mother continued to attend NA/AA meetings. Mother enrolled in random drug testing in May of 2013. Since then, she tested positive twice, had 14 no-shows, and tested negative the remainder of the time. Father had numerous positive tests and was inactivated due to his continuous no-shows.

Mother began, but failed to complete, numerous child abuse batterer's treatment programs. She returned to the program in June of 2014. Father completed only half of

the batterer's treatment program, claiming his absences were due to his employment and car trouble.

The social worker reported that mother posted a video of herself on Facebook in February 2014, in which she was seen consuming alcohol. That same month, grandmother expressed concern for J.D.'s safety while with mother, as grandmother had seen a friend of mother's at the house who previously supplied drugs to mother.

Mother's visits with J.D. were consistent, father's were not. But visits with mother failed to progress past eight to 16 hours per week, due to concerns of alleged ongoing domestic violence and mother's failure to maintain consistency in understanding J.D.'s severe food allergies. Mother needed constant reminders of J.D.'s allergies, despite receiving training and education materials on the issue.

The department recommended reunification services for father and mother be terminated because neither made significant progress in ameliorating the conditions that brought them to the attention of the department. The report noted mother's discharge from programs, the friction that continued between mother and grandmother, and mother's inability to understand and follow through on J.D.'s dietary needs caused by his allergies. The report also noted father's failure to submit to random drug testing and his discharge from a batterer's treatment program, as well as the continued relationship between father and mother, which was described as "unsafe, unstable, and terrifying" and reportedly included "constant yelling at all hours of the night."

The department opined that neither mother nor father had benefited from court-ordered services, and there was poor prognosis for returning J.D. to either of them. The report stated grandmother was willing to provide a permanent plan of adoption for J.D.

The contested six-month/12-month review hearing began December 11 and 12, 2014 and continued in April and May of 2015, which by this time was combined with an 18-month review hearing. The department's addendum report dated April 1, 2015, stated father was incarcerated from September through November of 2014 for possession of

methamphetamine. Mother reported that she allowed father to visit J.D. during the Thanksgiving and Christmas holidays. Father contacted the department in December of 2014 to resume services, but he failed to follow through on the referral. Father failed to request visits through the department and failed to comply with reunification services.

The social worker concluded that neither mother nor father demonstrated that they had benefitted from court-ordered services, and continued to recommend that reunification services be terminated. As stated in the report, “The parents have been offered reunification services since the Detention hearing on May 8, 2013. The family has had over 22 months of reunification services with an additional 8 months of Voluntary Family Maintenance. The family has had ample time to make necessary changes to demonstrate that they can safely parent [J.D.] while maintaining sobriety.”

The department’s May 26, 2015, addendum report stated there had been domestic violence disturbances at mother’s residence: one report referred to “mom[’]s boyfriend,” the other named another male, not father. Grandmother reported that she often saw father at mother’s house and had to wait for him to leave before dropping J.D. off for his visit with mother.

On May 26, 2015, the juvenile court terminated reunification services and set a section 366.26 hearing for September 21, 2015. Visits were ordered twice per month and supervised. Mother and father were advised of writ requirements.

#### Section 388 Petition

The section 366.26 hearing was continued a number of times. On November 30, 2015, mother filed a section 388 petition (or JV-180 Request to Change Court Order), seeking additional reunification services. Mother claimed changed circumstances since she had terminated her relationship with father, had been participating in services and attending support groups. She alleged the requested services would be in J.D.’s best interests because J.D. “loves me, and asks me when he can come home.”

The department filed a response requesting the petition be denied. The department stated mother had never been honest about her relationship with father, noting specifically a domestic violence altercation in July of 2015 between the two, which caused bruises and marks on mother's face. There was also information that, despite a three-year criminal court no contact order between mother and father beginning in August of 2015, mother continued to have an ongoing relationship with him.

The juvenile court trailed mother's section 388 petition to be heard at the same time as the section 366.26 hearing.

Section 366.26 Report

The September 21, 2015, report prepared in anticipation of the section 366.26 hearing recommended adoption with termination of parental rights as the most appropriate permanent plan for J.D. Three-year-old J.D. was described as developmentally on target, active and outgoing. He had various ongoing health concerns, severe allergies and asthma, but had undergone successful tonsillectomy, adenoidectomy and bilateral ear tube surgery. J.D. attended day care and had no mental health concerns. He continued to live with grandmother, as he had since May of 2013, and she had a close relationship with him and was meeting all of his needs. Grandmother wished to adopt J.D.

The department reported that mother consistently visited J.D., and during the supervised visits, J.D. was happy to see mother, the two were comfortable together, and they communicated with sign language.

Father's visits were sporadic. He began visits in the summer of 2013. In December of 2013, father requested unsupervised visits, but because he failed to drug test in October and November, those visits were not approved. Father began unsupervised visits in January of 2014, but visits were suspended when he missed drug tests. He did not visit J.D. from September to November of 2014, as he was incarcerated. Several

visits with father in jail had to be cut short. Following his release, the visits were again supervised and subsequently reduced.

The department acknowledged that J.D. knew mother and father as his birth parents and that they nurtured him during visits, but that he did not identify them as “parental figures.” The report opined mother and father’s ongoing domestic violence prevented them from teaching J.D. how to express his emotions in an appropriate manner. The department noted the incident in early July of 2015, when father was arrested for corporal injury after he punched mother in the face, badly bruising her. Thereafter, mother obtained a restraining order against father. Father was in jail at the time the report was written, and the department was concerned that, when father was released from custody, mother might resume her relationship with him.

The department assessed J.D. as adoptable and reported grandmother was committed to adopting him. Grandmother had given J.D. structure, nurtured him, was affectionate with him, and he looked to her to have his needs met. The department opined that there was no significant parent/child relationship between J.D. and mother or father, and that it would not be detrimental to J.D. to terminate their parental rights. Instead, it concluded J.D. had formed a significant parent/child relationship with grandmother.

The department reported grandmother would be referred for an adoption home study, as there did not appear to be any impediments to her approval as an adoptive parent. Grandmother was willing to allow mother and father to visit J.D. during holidays if they could demonstrate J.D. would be safe.

#### Section 388 and Section 366.26 Hearing

At the combined section 388 and section 366.26 hearing December 14 and 15, 2015, the juvenile court first considered the section 388 petition. The court denied the petition, stating it failed to make a prima facie showing of changed circumstances,

instead showing “only changing circumstances ....” It also found mother failed to show her request would be in J.D.’s best interests.

The juvenile court then proceeded with the permanency planning hearing. Mother testified that J.D. lived with her from birth until he was one and one-half years old. According to mother, after visits were reduced to one-hour visits in May of 2015, J.D. would cry when visits ended, said he did not want mother to leave, and on several occasions, expressed a desire to go home with mother. Mother testified that, when she had longer visits with J.D., he was happy and excited, whereas he was now unhappy during the visits. Mother attributed J.D.’s unhappiness with his wish to spend more, not less, time together. According to mother, J.D. was excited to see her when she visited. They interacted and communicated with sign language. Mother expressed a desire that J.D. receive therapy because mother had heard through grandmother that J.D. did not understand “what is going on.”

Mother also testified that J.D. had a sibling relationship with his five half siblings. She alleged J.D. recognized them as siblings and that their relationships were interactive and they enjoyed being together. Mother described several instances in which J.D. hugged one of his siblings and talked, wrestled, or watched television together. J.D. had not seen two of his siblings since May of 2015; he saw another sibling in June and November of 2015; and he had seen one of his siblings about four times since May of 2015. Mother did not think J.D. would be able to see his siblings if he was adopted, as she thought the family wishing to adopt him was trying to avoid contact with the siblings. Mother felt it was not in J.D.’s best interests to be adopted because he would be missing out on opportunities with her and her family.

Social Worker Yvette Roberts supervised some of the visits between mother and J.D. According to Roberts, J.D. was happy to see his mother at the visits. Roberts knew from the narratives that she read that J.D. had trouble separating from mother on one occasion in June of 2015. Roberts recommended that mother’s parental rights be

terminated because mother's behavior had not changed. Mother was still in a relationship with father and the department was "extremely afraid" of mother not being able to protect herself and J.D., and cited the incident in July when mother was bruised by father.

Roberts noted that mother continued to communicate with father, as recently as November of 2015, despite the active restraining order. In November of 2015, mother had been present at a Family First meeting father was attending. After the meeting, mother sent a letter to grandmother interceding on father's behalf and asking grandmother to forgive father. Roberts opined that, if mother was not able to protect herself, she would not be able to protect J.D., who is "extremely sensitive" due to the conflict between mother and father. Roberts opined that mother did not grasp "what domestic violence does to a child, as well as to herself."

Roberts did not think J.D. would suffer detriment if mother's parental rights were terminated. Roberts noted that J.D. was young and that his grandmother would keep him in contact with his family. According to Roberts, J.D. never mentioned any of his siblings during her conversations or interactions with him, although she acknowledged she never asked him. He never indicated any loss or sense of missing them.

At the noon break during the first day of the hearing, father's counsel stated father, who had been present, would be returning to jail at that time and would not return for the afternoon session. Through counsel, father then objected to the recommendations and findings. Although acknowledging J.D.'s caregiver was father's mother, counsel expressed father's hopes of being able to maintain a relationship with J.D. once he completed his "programs." Father thought adoption would prevent such a relationship from occurring. Counsel stated father had "no additional evidence or witnesses to present." Father then stated he did not wish to participate further in the proceedings and asked that his counsel be released.

When the hearing resumed, Social Worker Aide Mickey Vang testified that she helped supervise one visit between mother and J.D., which took place in June of 2015.

When J.D. arrived for the visit, he was excited to see mother and, at the end of the visit, he became upset and wanted to go home with mother.

Cecil Ann Morrison, identified as a department visitation employee, testified that she supervised about 10 visits between mother and J.D. According to Morrison, J.D. was at times excited to see mother and at other times preoccupied. Morrison described J.D. as “sad” at the end of the first visit she supervised. The most recent visit Morrison supervised was at the end of November 2015. Morrison had heard J.D. mention only one of his siblings, but the sibling had not been a part of any of the visits Morrison observed. Morrison described J.D. as excited to return to the care provider at the end of the visits.

Counsel for the department argued adoption and termination of parental rights was the most appropriate plan for J.D. Counsel noted J.D. had lived with grandmother since shortly after his removal in May of 2013 and was thriving in that placement.

Grandmother had created a structured environment for J.D., and she stayed current with his health needs. She taught J.D. how to recite the foods he is allergic to. Counsel argued neither mother nor father had occupied a parental role for J.D. since his removal nearly two and a half years earlier. Mother and father’s domestic violence history continued to be a concern, resulting in father’s current incarceration. Counsel noted that the domestic violence incident which occurred in July of 2015 took place after eight months of voluntary family maintenance and 22 months of family reunification services. Mother continued to have “some involvement” with father, despite an active restraining order. In addition, counsel argued, mother continued to blame the department for the infrequent visits she was allowed to have with J.D., without taking any responsibility for the situation.

Counsel for J.D. argued he was adoptable, as he was very young, active, energetic, healthy, and meeting all of his educational goals. J.D. had been with grandmother for more than half his life. As argued by counsel, mother began the dependency proceedings with unsupervised visits but, due to her own failures and conduct, visits reverted to being

supervised and restricted. Counsel described mother's 22 months of services as leading only to "regression," and that she consistently failed to heed the court's directives and orders, negating any parent/child exception to adoption. As for the sibling bond exception, counsel acknowledged that J.D. would recognize his siblings and had "some type" of relationship with them, but it did not override his need for permanence provided by adoption.

Mother's counsel argued that mother loved J.D. "very much and she feels very strongly that she doesn't want him to be adopted." Counsel argued mother believed it was in J.D.'s best interest to maintain a relationship with her and with his siblings. Mother requested a plan of legal guardianship instead of adoption.

The following day, the juvenile court issued its ruling, first reiterating that it had denied mother's petition for modification as it did not state a prima facie showing of changed circumstances, nor did she demonstrate that the requested modification would be in J.D.'s best interests. The court then addressed the issue of parental termination, noting that J.D. was first removed from mother and father due to domestic violence, which continued to be an issue despite the fact that mother completed some of the ordered reunification services. The court found mother was consistently told what she needed to do to before J.D. would be returned to her care and she failed to do so, specifically listing mother's need to demonstrate that she could prepare the appropriate food for J.D., "which requir[ed] reading labels carefully"; her need to provide him with a drug-free and domestic violence-free environment; and her need to demonstrate a "backup plan" in the event mother and father began arguing in front of J.D. Mother had failed to comply with these directives, as there was information mother had a positive drug test in February of 2015 and allowed father into the home, as well as information that father had been living with mother since May 2015, prior to his recent incarceration. Father was not consistent with his drug testing and was arrested in September of 2014 for drug possession. He had

over 60 no-shows on drug tests from 2013 to 2015, and, although he twice began a batterer's program he was discharged both times due to unexcused absences.

The juvenile court found J.D. adoptable "both generally and specifically" by clear and convincing evidence, and that he would likely be adopted, as grandmother wished to adopt him. The court noted J.D.'s bond with grandmother, whose ability to provide structure and nurture "far exceeded that offered by either or both parents combined." The court also found that, while mother and father completed some services, they did not apply what they had learned to their daily lives. And, while J.D. could identify mother and father as his biological parents, there was no significant parent/child relationship between J.D. and either mother or father.

As for the parent/child exception to adoption, the juvenile court acknowledged that mother and father had regularly visited J.D., but there was no showing he would benefit from continuing that relationship. As stated by the court, J.D.'s crying at the end of a few visits was not indicative of a beneficial continued relationship. The juvenile court articulated the necessary showing for the exception to apply: that the relationship would promote the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new adoptive parents. The juvenile court found that the incidents mother relied on to make this showing "falls far short of the showing required under the law." The juvenile court found the beneficial parent/child relationship exception not applicable.

Neither did the juvenile court find the sibling relationship exception applicable. The court noted specifically that J.D. was not raised with any of his five half siblings in the same home. While he had some contact with some of his siblings during his first year and during visits, the juvenile court did not find the contact significant. Some of his siblings were in and out of foster care, others lived with their father. One was at least "driving age" with a child of her own, old enough, as the juvenile court noted, to come to court during the proceedings, but had not. The juvenile court found "[h]aving contact

with these other individuals is not at all the same as being raised with a sibling in the same home.” Nor did the juvenile court find mother presented evidence to show J.D. and his siblings shared significant common experiences. The juvenile court found ongoing contact with J.D.’s siblings was not in J.D.’s best interests, including his long-term emotional interest.

In summary, the juvenile court stated, “[f]inding no compelling reason to determine that termination would be detrimental due to a statutory exception, the Court is required to terminate parental rights and place the child for adoption, and that is this Court’s order.”

## **DISCUSSION**

### **I. SECTION 388 PETITION**

Mother argues the juvenile court abused its discretion when it denied her section 388 petition to modify a court order without first holding an evidentiary hearing. The juvenile court did not err.

#### Standard of Review

There is authority that we review the summary denial of a section 388 petition without an evidentiary hearing for abuse of discretion. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460.) “““The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.”” [Citations.]” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) ““The denial of a section 388 motion rarely merits reversal as an abuse of discretion.” [Citation.]” (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.) On the other hand, as mother contends, whether the petition states a prima facie case sufficient to require a hearing may be reviewable de novo. Under either standard, the juvenile court did not err.

### Section 388

“A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new or changed circumstances exist, and (2) the proposed change would promote the best interest of the child. [Citation.] The parent bears the burden to show both a “legitimate change of circumstances,” and that undoing the prior order would be in the best interest of the child. [Citation.]” (*In re S.J.* (2008) 167 Cal.App.4th 953, 959.)

A parent must make a prima facie showing under section 388 to trigger the right to a hearing. (§ 388, subd. (d); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250; Cal. Rules of Court, rule 5.570(h).) “There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence; and that (2) revoking the previous order would be in the best interests of the children.” (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079.) A prima facie showing is made if the liberally construed allegations of the petition show both changed circumstances and that the best interests of the child may be promoted by petitioner’s proposed change of order. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431-432.) Merely changing circumstances is insufficient. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.)

“The requirement of petitioning the court for a hearing pursuant to section 388 to show changed circumstances must be viewed in the context of the dependency proceedings as a whole. [Citation.]” (*In re Marilyn H., supra*, 5 Cal.4th at p. 307.) Once reunification services are terminated, the focus shifts from reunification to the child’s need for permanency and stability, and a section 366.26 hearing to select and implement a permanent plan must be held within 120 days. (*In re Marilyn H., supra*, at p. 309.) For a parent “to revive the reunification issue,” the parent must prove that circumstances have changed such that reunification is in the child’s best interest. (*Ibid.*)

### Procedural Background

The petition was set for December 8, 2015, before Judge Mary Dolas. On that date, mother's counsel requested that the matter be trailed to coincide with the section 366.26 hearing set for December 14, 2015. The juvenile court stated it would "trail the matter to be heard with the .26 hearing ...."

By the time of the combined sections 388 and 366.26 hearing December 14, 2015, before Judge Kimberly Nystrom-Geist, the department had filed a response to mother's section 388 petition, and submitted on its reports, for both the section 366.26 hearing and the section 388 petition. Minor's counsel submitted on the recommendations of the department to terminate parental rights as set forth in the section 366.26 report and supported the department's opposition to the section 388 petition, but wished to be heard on the petition "when it's appropriate."

The juvenile court then turned to mother's counsel and asked that she call her first witness. Before mother began her testimony, mother's counsel asked if the juvenile court wished mother to testify regarding the issues of the section 366.26 hearing or the section 388 petition. The juvenile court stated the division was "artificial" and to offer "whatever evidence you have" and "we'll sort through it."

Minor's counsel interjected that Judge Dolas trailed the section 388 petition to accompany the section 366.26 hearing, but had not made a ruling on the prima facie sufficiency of the section 388 petition to call for a hearing. Furthermore, minor's counsel argued, the section 388 petition filed by mother had not met the three prongs necessary to require an evidentiary hearing: mother alleged no new evidence, there was no showing of changed circumstances, and the relief requested was not in J.D.'s best interests. Minor's counsel asked that the juvenile court "rule on the sufficiency of evidence on this JV-180 before we go forward as to any testimony regarding it."

The juvenile court agreed that the minute order from the December 8, 2015, hearing was "silent on the issue as to whether or not Judge Dolas found that the JV-180

was sufficient.” Counsel for the department also did not believe Judge Dolas had made a finding, but simply “trailed” the petition. Mother’s counsel stated she was not present at that hearing, but stated “I don’t believe that she took a position one way or the other on that day.” Father’s counsel stated, “I was present in court and the matter was simply trailed. The mother was not even present for the hearing, as we did the hearing very early on in the morning before the [sign language] interpreter arrived. So there [were] no findings made by the Court on that day ....”

Argument was then had on whether the section 388 petition made the necessary prima facie showing. Mother’s counsel argued mother had a change of circumstances since services terminated in May of 2015 because she had gone back to classes at Marjoree Mason Center and had benefited from those classes. Mother’s counsel argued mother believed continued reunification services would be in J.D.’s best interests because she believed he desired to go home with her. Mother’s counsel asked that “testimony on this matter” be allowed.

Father’s counsel submitted on the motion, as did counsel for the department, stating it joined minor’s counsel’s earlier argument in its entirety.

The juvenile court then stated it had reviewed the section 388 petition and the department’s response, and stated it agreed with minor’s counsel’s argument. It found:

“[M]other has failed to make a sufficient initial showing. She has not made a prima facie showing as required by Welfare and Institutions Code Section 388 and the applicable Rules of Court, in that first her document shows only changing circumstances and not changed circumstances. The attachments are brief and show five classes – five sessions only that she attended beginning in September, and one class on a safe group – or one session, not one complete class. Nothing else. No progress reports. Nothing else. So the mother’s document fails for showing as it does not demonstrate changed circumstances. And more importantly in the Court’s view, it does not make any indication that the requested change or action would be better for the child. There is no showing that mother’s request would be in the child’s best interest.”

### Applicable Law and Analysis

Mother first argues the juvenile court violated procedural due process when it failed to hold a hearing on mother's section 388 petition. As argued by mother, a hearing is required "when the court does not summarily deny the petition and orders a hearing," as she claims Judge Dolas did here, and that a hearing was required "because all parties, as well as the court, thought a hearing had been ordered ...." We find no merit to mother's claim.

The juvenile court in *In re G.B.* (2014) 227 Cal.App.4th 1147 (*G.B.*), considered and rejected a similar issue to that raised by mother here. There, the mother claimed the juvenile court improperly denied an evidentiary hearing on her section 388 petition because "the court initially checked the box on the form order indicating that a hearing would be held 'because the best interest of the child may be promoted by the request.'" (*G.B.*, *supra*, at p. 1158.) The *G.B.* court held "a contextual review of the record here shows that in checking the box on the form order indicating such a finding, the juvenile court was not deciding that a prima facie case had been made but was instead scheduling the matter for the parties to argue the issue—an option not included on the form. When the court heard the parties' oral argument on whether an evidentiary hearing was required, it expressly clarified that it had liberally construed mother's petition 'in order to have an opportunity for the parties to argue for a hearing.'" (*Ibid.*, italics omitted.)

Mother maintains, as did the parent in *G.B.*, that the procedure employed by the juvenile court denied her due process under *In re Lesly G.* (2008) 162 Cal.App.4th 904 (*Lesly G.*).

"In [*Lesly G.*], the juvenile court used an ambiguous Judicial Council form (which has since been updated) to rule on a parent's entitlement to a hearing on a section 388 petition requesting the resumption of previously terminated reunification services. [Citation.] On the form, the juvenile court checked three internally inconsistent boxes: one indicating a hearing would be held because the parent had established a prima facie case, one setting a date and time for the hearing, and one indicating a hearing would

not be held. [Citation.] The clerk also sent a notice to the parties informing them that a hearing had been set. [Citation.] The court continued a scheduled selection and implementation hearing to review the section 388 petition, and it ordered the social services agency to address the petition. [Citation.] At the beginning of what was anticipated to be a combined section 388 hearing and a selection and implementation hearing, the juvenile court denied the section 388 petition, apparently without explanation. [Citation.] In a later written order, the juvenile court simply stated that the proposal to resume reunification services would not promote the children's best interests. [Citation.] [¶] In assessing this procedural history, *Lesly G.* concluded that the juvenile court's denial of the section 388 hearing violated the parent's due process rights because the form order had already ruled that the section 388 petition stated changed circumstances and might promote the children's best interests. [Citation.] The social services agency conceded on appeal that the ruling on the form order established that the juvenile court had not summarily denied the petition for lack of alleging a prima facie case. [Citation.] Thus, the question facing the Court of Appeal was whether the juvenile court properly considered the section 388 petition without holding a hearing after it had already concluded that the parent had made a prima facie case for such a hearing. [Citation.]" (*G.B., supra*, 227 Cal.App.4th at p. 1159.)

The circumstances in *Lesly G.* differ from those here. Other than Judge Dolas's statement that the section 388 petition would be trailed to coincide with the section 366.26 hearing, as requested by mother's counsel, there was no indication that a determination had been made on the prima facie showing.<sup>3</sup> And, at the subsequent December 14, 2015, hearing before Judge Nystrom-Geist, as noted in detail above, all parties agreed, or did not disagree, that no such finding had been made. We therefore reject mother's claim of procedural due process error.

We further find that mother's petition failed to make a prima facie showing of changed circumstances. In mother's petition and through her counsel's argument at the hearing, mother alleged changed circumstances because she had been attending classes and benefited from them. And she alleged in her petition that J.D. would benefit from

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<sup>3</sup> The minute order for that date states that a continuance on the section 388 petition was granted at mother's counsel's request "to trail" the section 366.26 hearing.

mother receiving further reunification services because he loved her and asked when he could go home with her. Attached to mother's petition were only two signature pages from the programs she was attending: one showed she began classes in November of 2015 and completed only two of the possible 12 topic sessions; the other showed that she began classes September of 2015 and had completed five of a possible 12 weeks of unspecified classes. In addition, mother did not submit any letters or progress reports from counselors or therapists to show she was actually benefiting from classes. This was especially important to establishing a prima facie case of changed circumstances, given that mother had already failed to benefit from the services she received during the reunification period.

Mother previously participated in reunification services without success. At this posttermination of reunification services stage of the case, the focus was on J.D.'s need for permanency and stability. Mother's recent ongoing participation in a few classes, without more, was not a change of circumstances of such a "significant nature" that it required the juvenile court to set aside its order terminating reunification services. (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485.) Because mother did not establish the first prong of the section 388 analysis, we need not address the second prong, the best interests of the child. Accordingly, the juvenile court did not err in denying mother's section 388 petition without a hearing.

## **II. BENEFICIAL PARENT/CHILD RELATIONSHIP EXCEPTION AND SIBLING RELATIONSHIP EXCEPTION**

Mother does not dispute that J.D. was adoptable. Instead, she argues her parental rights were wrongly terminated because the juvenile court failed to apply the parent-child beneficial relationship exception and/or the sibling relationship exception. We disagree.

Before we address the merits of her claim, we briefly review the applicable statutory framework as well as the standard of review.

### Applicable Law

As stated above, after reunification services are terminated, “the focus shifts to the needs of the child for permanency and stability.” [Citation.]” (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) A hearing under section 366.26 is held to design and implement a permanent plan for the child. At a section 366.26 hearing, once the juvenile court finds by clear and convincing evidence that the child is likely to be adopted within a reasonable time, the court is required to terminate parental rights and select adoption as the permanent plan, unless the parent shows that termination of parental rights would be detrimental to the child under one of several statutory exceptions. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 (*Bailey J.*)). One of these statutory exceptions is the beneficial parent-child relationship exception to adoption, which applies when it would be detrimental to the child to terminate parental rights if “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) Another exception is where “[t]here would be substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of legal permanence through adoption.” (*Id.*, subd. (c)(1)(B)(v).)

The burden is on the party seeking to establish the beneficial relationship exception to produce evidence establishing the exception is applicable. (*Bailey J., supra*, 189 Cal.App.4th at p. 1314.) Once the juvenile court finds that a parent has met his or her burden to establish the requirements of the beneficial relationship exception, the juvenile court may choose a permanent plan other than adoption if it finds the beneficial

relationship to be “a compelling reason for determining that termination would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B); see *Bailey J., supra*, at p. 1315.)

### Standard of Review

Review of the applicability of exceptions under section 366.26 is governed by a hybrid substantial evidence/abuse of discretion standard of review. (*Bailey J., supra*, 189 Cal.App.4th at pp. 1314-1315.)

“Since the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental or sibling relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court’s determination. Thus, ... a challenge to a juvenile court’s finding that there is no beneficial relationship amounts to a contention that the ‘undisputed facts lead to only one conclusion.’ [Citation.] Unless the undisputed facts established the existence of a beneficial parental or sibling relationship, a substantial evidence challenge to this component of the juvenile court’s determination cannot succeed. [¶] The same is not true as to the other component of these adoption exceptions. The other component of both the parental relationship exception and the sibling relationship exception is the requirement that the juvenile court find that the existence of that relationship constitutes a ‘*compelling* reason for determining that termination would be detrimental.’ (§ 366.26., subd. (c)(1)(B), italics added.) A juvenile court finding that the relationship is a ‘compelling reason’ for finding detriment to the child is *based* on the facts but is not primarily a factual issue. It is, instead, a ‘quintessentially’ discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. [Citation.] Because this component of the juvenile court’s decision is discretionary, the abuse of discretion standard of review applies.” (*Bailey J., supra*, 189 Cal.App.4th at pp. 1314-1315.)

“““The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.”” [Citations.]” (*In re Stephanie M., supra*, 7 Cal.4th at pp. 318-319.)

In sum, the hybrid standard of review enunciated in *Bailey J.* explains how a juvenile court should weigh the various factors in determining if an exception to adoption exists, and how an appellate court should review its decision. From the plain meaning of the statute, it is clear the Legislature intended to give courts discretion to determine whether the exceptions listed in section 366.26, subdivision (c)(1)(B)(i)-(iv), including the beneficial parent-child and sibling relationship exceptions, constitute a “compelling reason for determining that termination would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B).)

*No error in rejecting beneficial parent-child relationship exception*

In deciding whether the beneficial parent-child relationship applies, “the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)) “If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*Ibid.*) The parent-child relationship must “promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*Ibid.*)

A parent claiming the applicability of the parent-child relationship exception has the burden of proof. (*In re C.B.* (2010) 190 Cal.App.4th 102, 133.) “[I]t is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350; see *In re Celine R.*, *supra*, 31 Cal.4th at p. 53.)

The parent-child relationship exception “does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of

visitation with the parent.” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348.) “[A] child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child’s need for a parent.” (*Id.* at p. 1350.) Even a “loving and happy relationship” with a parent does not necessarily establish the statutory exception. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419.)

“The *Autumn H.* standard reflects the legislative intent that adoption should be ordered unless exceptional circumstances exist, one of those exceptional circumstances being the existence of such a strong and beneficial parent-child relationship that terminating parental rights would be detrimental to the child and outweighs the child’s need for a stable and permanent home that would come with adoption.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) “[T]he *Autumn H.* language, while setting the hurdle high, does not set an impossible standard nor mandate day-to-day contact.” (*Ibid.*) “Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship. A strong and beneficial parent-child relationship might exist such that termination of parental rights would be detrimental to the child, particularly in the case of an older child, despite a lack of day-to-day contact and interaction.” (*Ibid.*)

The department does not dispute that mother maintained regular visitation with J.D. and that they had a relationship. But in order to demonstrate J.D. would benefit from a continued relationship with her, mother needed to demonstrate that maintaining the parent-child relationship would promote J.D.’s well-being, outweighing the emotional benefits he would gain in a permanent home with adoptive parents. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) In determining whether the relationship between parent and child is beneficial, we look to such factors as “(1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive and negative effect of interaction between the parent and the child, and (4) the child’s particular needs.” (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 467, fn. omitted.) The juvenile court’s conclusion

that mother did not satisfy the second prong of the exception “turns on a failure of proof at trial, [such that] the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law.” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

Mother’s interactions with J.D. at twice monthly visits was generally positive, and there was some evidence that J.D. enjoyed his visits with mother. Mother read to J.D. and played with him, and brought appropriate food to the visits. J.D. recognized mother as “mom,” which he verbally stated and signed, and mother said the visits began and ended with hugs and kisses. Mother notes J.D. cried at the end of one visit when it was time to say goodbye. However, frequent and loving contact with a child does not necessarily establish the existence of a benefit for continuing the parent-child relationship. (*In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1418.) Mother must also demonstrate she occupies “a parental role” in J.D.’s life, which she failed to do. (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) Mother did not provide any evidence, aside from the fact that J.D. enjoyed the monthly visits, showing he would be severely harmed if his relationship with her was severed. Her love and concern for him does “not equate to the day to day care and devotion the average parent expends on behalf of [a child].” (*In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.) Substantial evidence supported the juvenile court’s conclusion that mother failed to show that J.D. would benefit from continuing the relationship with her.

Furthermore, even if mother had satisfied her burden to establish a beneficial parent-child relationship existed, her claim would still fail because the juvenile court would not have abused its discretion in finding that the exception did not present a “compelling reason for determining that termination would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B).) There is no dispute that J.D. was adoptable, and that grandmother was ready and willing to adopt him.

J.D. had been living with grandmother for two years and had formed “a healthy parent/child relationship” with her. Grandmother provided J.D. the daily “structure” he required. J.D. viewed grandmother as his source of security and comfort, and he looked to her for reassurance, love, and affection. Grandmother provided J.D. with a drug and domestic violence free environment. Grandmother was well aware of J.D.’s allergies, provided him with meals he could eat, taught him which foods he was allergic to, and kept his Epi-pen and inhaler at the ready.

In contrast, mother was not able to show a commitment to severing her relationship with father, leaving her open to additional abuse and the possibility of violence in the home. Nor did she show a clear commitment to maintaining a drug free home. In addition, it was not certain whether mother took J.D.’s allergies seriously, sometimes forgetting what J.D. could not eat.

The juvenile court’s conclusion that severing the parent-child relationship in this situation would not deprive J.D. of a substantial, positive emotional relationship such that he would be greatly harmed did not exceed the bounds of reason. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.) Aside from the showing that J.D. enjoyed visits with her, mother failed to demonstrate that he was attached or bonded to her or that he would suffer detriment as a result of terminating her rights. Accordingly, we find the juvenile court did not err in rejecting the beneficial parent-child relationship exception.

No error in rejecting sibling relationship exception

Mother also argues that the juvenile court erred in terminating parental rights to J.D. because, in so doing, the court severed the relationship between him and his five older siblings. We disagree.

To establish the sibling relationship exception, the parent must show: (1) the existence of a significant sibling relationship; (2) that termination of parental rights would substantially interfere with that relationship; and (3) that it would be detrimental to

the child being adopted if the relationship ended. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 952; see *In re Celine R.*, *supra*, 31 Cal.4th at p. 54.) As with the parent-child exception, the parent asserting the sibling relationship exception has the burden of proof. (*In re L. Y. L.*, *supra*, at p. 952.) If the parent makes this showing, then the juvenile court balances the benefit to the child of continuing the sibling relationship against the benefit of adoption. (*Id.* at pp. 952-953.) However, even if a sibling relationship exists that is so strong its severance would cause the child detriment, the juvenile court may still conclude that the detriment is outweighed by the benefit of adoption. (*Ibid.*) It is a “rare” case in which the court will find that this exception to adoption applies, particularly when the proceedings concern a young child whose needs for a competent, caring and stable parent are paramount. (*In re Valeria A.* (2007) 152 Cal.App.4th 987, 1014.) “Because this component of the juvenile court’s decision is discretionary, the abuse of discretion standard of review applies.” (*Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315.)

Here, the evidence presented supported the juvenile court’s conclusion that the sibling relationship exception did not apply to prevent adoption. At the section 366.26 hearing, mother testified that J.D. had five older half siblings. She acknowledged that J.D. was not close to his oldest sibling T., but claimed the other four, A. (age 20), J. (age 18), B. (age 14) and S. (age 13), had known him “his whole life.” Mother stated J.D. recognized B. as a brother and the two interacted when they were together. Mother testified J.D. recognized A. and J. as his sisters and spent the previous Thanksgiving with them, where J.D. gave J. a hug and seemed to recognize her. Before J.D. was removed from mother’s care, A. was living in the home as well, but then got pregnant and moved in with her boyfriend; J. was in the home “but then was in various foster homes”; and B. and S. were living with their father. After J.D. was removed, mother testified J.D.’s siblings came to visit him when she had day long visits with J.D. Since mother’s services were terminated in May of 2015, J.D. had not seen B. or S.; J.D. had seen A. once in June

and twice in November; and had seen J. three or four times. Mother testified J.D. was happy to see his brothers and sisters.

While there is some evidence presented that J.D. was fond of his siblings, mother did not present any evidence to show that J.D. was closely bonded to any of them, let alone that it would be detrimental if his relationship to any of them was ended. The only evidence of detrimental interference mother testified to was that she did not believe J.D. would be able to see his siblings after he was adopted because she thought grandmother's family was trying to "avoid that contact."

While maintaining sibling relationships is extremely important (see *In re Erik P.* (2002) 104 Cal.App.4th 395, 404), J.D. maintaining the sibling relationship with various older half siblings he saw infrequently did not outweigh the benefit he would enjoy though the permanence of adoption. (See *In re L. Y. L.*, *supra*, 101 Cal.App.4th at pp. 951-952.)

We find the juvenile court did not abuse its discretion when it found that the benefits to J.D. of adoption outweighed the detriment that could occur as a result of losing his legal relationship with his older half siblings.

### **DISPOSITION**

The orders of the juvenile court are affirmed.

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McCABE, J.\*

WE CONCUR:

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LEVY, Acting P.J.

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PEÑA, J.

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\* Judge of the Superior Court of Merced County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.